

Application No. 08/480,461  
Reply dated August 26, 2008  
Reply to Office Action of May 29, 2008

### REMARKS

In the Office Action, the Examiner rejected claims 90 and 95-242 on the ground of nonstatutory obviousness-type double patenting (ODP) as being unpatentable over claims 1-114 of U.S. Patent No. 6,270,498 and claims 1-219 of U.S. Patent No. 6,096,038. Furthermore, the Examiner provisionally rejected claims 90 and 95-242 on the ground of nonstatutory ODP as being unpatentable over claims 119-129 of copending Application No. 10/638,023. Application No. 10/638,023 issued on February 5, 2008 and is now U.S. Patent No. 7,326,214. In addition, Applicant notes claims 90 and 140 were previously cancelled and claim 242 never existed. Accordingly, Applicant assumes that the Examiner properly meant to reject claims 95-139 and 141-241 based on U.S. Patent Nos. 6,270,498; 6,096,038; and 7,326,214. Thus, Applicant will respond to all three rejections as nonstatutory ODP rejections, rather than responding to the provisional nonstatutory ODP rejection, based on U.S. Patent No. 7,326,214.

In response to the nonstatutory ODP rejections based on U.S. Patent Nos. 6,270,498 and 6,096,038, Applicant is submitting concurrently with this Reply a Terminal Disclaimer of the terminal part of any patent granted in the present application which would extend beyond the expiration of U.S. Patent Nos. 6,270,498 or 6,096,038.

Regarding the rejection over U.S. Patent No. 7,326,214, however, Applicant submits that the claims of the present application are not an obvious variation of any claims of U.S. Patent No. 7,326,214. The claims of the present application are directed to a distractor or apparatus, having disc penetrating extension(s) for bearing against the endplates of adjacent vertebral bodies or a distractor tip to maintain distraction of a disc space. The claims of U.S. Patent No. 7,326,214, entitled Bone Cutting Device Having a Cutting Edge with a Non-Extending Center, are directed to a drill. For example, Applicant directs the Examiner's attention to independent claim 1 of U.S. Patent No. 7,326,214 which claims "[a] drill for use in performing spinal surgery for forming an opening in the spine..." Applicant submits that one of ordinary skill in the art would not conclude that a spinal distractor as claimed in the present application is an obvious

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variation of a drill. Therefore, Applicant submits that the rejection over U.S. Patent No. 7,326,214 cannot be maintained. Accordingly, the obviousness-type double patenting rejection based on U.S. Patent No. 7,326,214 has been overcome.

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

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By: 

Amedeo F. Ferraro

Registration No. 37,129

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (310) 286-9800  
Facsimile: (310) 286-2795